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No. 86-1562

In The
Supreme Court of the United States
October Term, 1986

PAWTUXET COVE MARINA, INC., *et al.*,
Petitioners,

v.

CIBA-GEIGY CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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June 11, 1987

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PARTIES TO THE PROCEEDING

Pawtuxet Cove Marina, Inc. has no parent companies, subsidiaries or affiliates.

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STATEMENT OF THE CASE

Petitioners' original Statement of the Case is incorporated herein by reference. Petitioners emphasize that the chemical company emitted illegal discharges after this litigation commenced and continued to operate under an Environmental Protection Agency permit through August 29, 1984.

ARGUMENT

Respondent's memorandum indicates some facts which are both misleading and inaccurate. The purpose of this reply memorandum is to clarify the facts so that this Honorable Court can accurately review this case. The particulars must be corrected so this Court can consider this petition on its merits and properly frame a decision should the petition be granted and summary action taken.

This Court must be apprised of the correct facts in order to make an informed judgment granting the petition for certiorari or ordering a summary disposition. The confusion of facts should not dissuade this Court from granting certiorari here where the circuit courts continue to be in conflict. Certiorari has been granted to consider the same issue in another case. *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (C.A. 4, 1986), certiorari granted, — U.S. —, 93 L.Ed. 2d 827, 107 S.Ct. 872 (1987).

A. THE CHEMICAL COMPANY CONTINUED TO DISCHARGE UNDER THE SAME FEDERAL WATER POLLUTION CONTROL ACT PERMIT BEYOND THE COMMENCEMENT OF THIS LITIGATION.

Respondent's memorandum at page two states that the chemical company's permit "expired by its own terms in July of 1983". The chemical company's permit was due to expire, however it was renewed and hence continued in effect at least until August 29, 1985. In June, 1986 the chemical company admitted that its permit was still in effect (Brief of Appellee at 10, *Pawtuxet Cove Marina, Inc. v. CIBA-GEIGY Corp.*, 807 F.2d 1087 (C.A. 1, 1986).

Any implication that the chemical company stopped its emissions under its Clean Water Act, 33 U.S.C. section 1251, *et seq.* permit is untrue.

When the permit was renewed, it contained new conditions. After years of delay, the chemical company was required to "tie-in" to the city of Cranston's sewer system. The renewed permit, with the same Environmental Protection Agency number, allowed the chemical company to continue to emit cooling water, thereby modifying the temperature of the Pawtuxet River. Briefly stated, the permit was the same—only more strict.

The chemical company makes the circumstances more confusing in the first footnote of its memorandum. To clarify, the chemical company, not the city, held the permit. The chemical company's permit is very much an issue in this case: This same permit was violated (Petition at page 4) after this litigation commenced. Moreover, the discharges were not "relatively small". For example, the emission of September 7, 1983 included 50,000 gallons of wastewater (Petition at page 4).

The chemical company continues to juxtapose facts by claiming that it no longer discharged "process" wastewater. (Respondent's Memorandum at pages 2, 3, and 10). In truth, discharges into the Pawtuxet River were released. The "non-process" discharges were permitted, and process wastewater discharges were prohibited by the renewed Clean Water Act permit.

Surprisingly, the chemical company now introduces a new justification for its violation of September 7, 1983. Respondent's memorandum, page 7, footnote 10. No explanation was provided in the courts below. The chemical

company denied that this spill occurred even during the oral arguments before the Circuit Court of Appeals. Unable to change the past, the chemical company now attempts to justify an admitted violation of its permit. There is no justification for illegal pollution.

In sum, the crux of the petition should not be obscured. Throughout the course of this litigation, the chemical company held a discharge permit. It violated the permit before, during and after the litigation commenced.

B. THE CHEMICAL COMPANY CONFUSES THE TRAVEL OF THIS CASE AT THE TRIAL COURT LEVEL.

The chemical company accuses your petitioners of hampering the trial court. Petitioners never made "assurances" that the common law counts were founded on independent bases (Respondent's Memorandum at page 4). It is untrue that "the issue . . . had been resolved." (Respondent's Memorandum at page 4). The trial court's decision (Appendix pp. 22-32) does not indicate whether the common law counts survive on their own.

To rectify what issues could be tried, petitioners asked the trial court whether the nuisance, negligence, and strict liability counts were adjudged or limited by the summary judgment decision. These requests were made orally at pretrial conferences and by a formal Motion to Clarify. The trial court refused to consider these requests. At trial, your petitioners recognized that further proceedings might be wasteful, and again sought resolution:

> After a day-and-a-half of trial, this noontime Mr. Lanphear, to his credit, has informed the Court and

> opposing Counsel that his case, as he sees it, is dependent on the lack of dredging and on the causal connection as the Plaintiffs view it between the Defendant's conduct and the lack of dredging.
>
> (District Court Judge Selya, transcript of proceedings of United States District Court For The District Of Rhode Island, Tuesday, February 14, 1986.)

Petitioners agreed to dismiss the claim of trespass but never "admitted they could not prove any trespass." (Respondent's memorandum, page 5, footnote 6). Rather, the trial court suggested to petitioners that if a trespass was proven, petitioners would only be awarded nominal damages. To save the trial court's valuable time, petitioners opted to avoid a lengthy, complicated trial which would result in mere nominal damages.

The chemical company further infers that plaintiffs attempted to delay the trial court proceedings.

> [A]t trial, plaintiffs admitted that they were unable to offer any additional evidence, . . . bearing on the causal connection between CIBA-GEIGY's discharges and the lack of dredging of Pawtuxet Cove. Respondent's memorandum, p. 8, footnote 12.

Neither petitioners nor their attorneys made such statements. Rather, they had proof and continue to have proof of a causal connection between Ciba-Geigy's discharges and the lack of dredging of the Pawtuxet Cove. The trial court would not allow petitioners to introduce this proof into evidence even after repeated offers of proof. Therefore, petitioners again asked for clarification of the summary judgment order. Now, petitioners request that the common law counts be restored so that they may introduce this proof.

C. THE CIRCUIT COURT OF APPEALS SHOULD NOT HAVE DECIDED ISSUES OF FACT.

Not only does the chemical company use erroneous facts, it buttresses its arguments with incorrect findings used by the First Circuit Court of Appeals.

The chemical company relies on the holding of the Court of Appeals that "defendant had ceased operating under this permit" and "there was no reasonable likelihood that the defendant's alleged infractions would continue" *Pawtuxet Cove Marina, Inc. v. CIBA-GEIGY Corp.*, 807 F.2d 1089, 1094 (C.A. 1, 1986); App. at 10; Respondent's Memorandum at 5. The circuit's decision is manifestly incorrect. The chemical company continued to operate under the permit and future violations occurred. There are no findings of fact by the trial court for the circuit to make these conclusions.

The citizens suit claim under the Clean Water Act was rejected by the trial court in response to a motion to dismiss. In considering such a motion, courts must consider facts in a light most favorable to the non-moving party (petition, p. 8). It was inappropriate for the Court of Appeals to make its own findings of fact here. See *McCaughn v. Real Estate Land Title & Trust Co.*, 297 U.S. 606, 608, 80 L.Ed. 879, 881, 56 S.Ct. 604, 605 (1936). Hence, the recital of facts by the First Circuit Court of Appeals should not be considered binding or accurate, but mere assumptions. These assumptions were not well-founded and show that the Circuit Court's decision was misplaced and should be ignored. Petitioners urge this Honorable Court to review the trial court record as it stands and overturn the dismissal and summary judgment orders on conventional legal standards.

CONCLUSION

Petitioner submits this reply memorandum in order to correct a number of crucial facts which have been inaccurately presented by the respondent. Petitioners request that the Petition for Certiorari be granted.

Respectfully submitted,

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June 11, 1987